APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT I. GREENBERG,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 92-6023
v.	)	(D.C. No. CIV-90-1302-A)
	)	(W.D. Okla.)
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before TACHA, SETH, and BALDOCK, Circuit Judges.

The Appellee herein, Robert Greenberg, brought suit under Oklahoma law against the Appellants Laurance B. Wolfberg and Carolyn Wolfberg asserting causes of action for malicious prosecution and abuse of process. The Complaint was based on a series of lawsuits brought against Greenberg personally, or against his interests, by the Appellants, the Wolfbergs, beginning on November 3, 1986 and continuing into 1990.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

The jury returned a general damages verdict against the defendants in the amount of $284,000. The jury heard evidence as to the financial position of both defendants and awarded punitive damages of $1,750,000 against Laurance Wolfberg and $500,000 against Carolyn Wolfberg. The court denied the post-trial motions of defendants. Defendants appealed.

This court certified several questions raised in this appeal to the Supreme Court of Oklahoma. The response of that court as to the applicable law of Oklahoma was most helpful.

Robert Greenberg and Carolyn Wolfberg are the children of Mal Greenberg and Rose Greenberg. Laurance Wolfberg is married to Carolyn Greenberg Wolfberg. Robert Greenberg and Laurance Wolfberg over several years had jointly held interests in several businesses. Mal Greenberg left a testamentary trust for the benefit of his children and his wife, Rose Greenberg. On the death of Rose the trust estate was to be divided. Robert Greenberg was to receive his portion outright, but Carolyn's share was to remain in trust. Robert Greenberg was named a trustee of the testamentary trust and the continuing trust for Carolyn. Much of the litigation which is here relates to this trust following Mal Greenberg's death.

Sometime in 1982 Robert Greenberg and Laurance Wolfberg agreed to separate their joint interests. This included their interests in Service Business Forms. By the division, Wolfberg was to receive all the shares in Service except those shares held by the Mal Greenberg Testamentary Trust. They were so sold and Service executed a note to the trust for the purchase price ($100,000). Wolfberg thus acquired control of all the shares of Service. This note became the subject of some of the continuing litigation.

The joint interests in an oil well service company, Griffith Resources, were to be separated. However, Griffith owed a bank loan and the bank had made a demand for payment. Greenberg and Wolfberg agreed to pay a share of this loan ($400,000) by having Green Wolf Oil

Company (another jointly owned enterprise) loan the money to Griffith Resources. This was done.

The case before us, both the malicious prosecution cause of action and the abuse of process cause, are based on several predicate cases brought against Greenberg, or his interests, by the defendants herein, as mentioned. The several cases are described below. Some detail appears to be necessary to explain the interrelation among the cases.

Case No. 1. The first predicate case was filed in the United States District Court for the Western District of Oklahoma on November 3, 1986 (CIV-81-2441-C). It was titled Laurance Wolfberg v. Robert Greenberg. One count asked for an audit of the Green Wolf Partnership accounts which was granted by the court. Wolfberg also asserted that the fee charged by Greenberg to manage the partnership was excessive. A refund of profits was requested. There was also a claim that Greenberg used borrowed money for his own account which belonged to the partnership, but this was abandoned before trial.

There was also an attempt in the suit to hold Greenberg responsible for the $400,000 loan to Griffith Enterprises. Punitive damages of one million dollars were sought.

The trial court granted the audit, as mentioned, but denied all other claims for breach of duty. As to the Griffith note, the trial court characterized Wolfberg's testimony as incredible and unbelievable and this "tainted his credibility with respect to every other issue."

The trial court's decision was appealed by Wolfberg, affirmed May 1989, and rehearing by the court of appeals was denied. Wolfberg sought certiorari from the United States Supreme Court. This was denied November 13, 1989.

Case No. 2 was filed November 26, 1986 in the state court, the District Court for Oklahoma County, Oklahoma (No. CJ-86-12606). Plaintiffs were the Wolfbergs and Service Business Forms. Greenberg was a defendant (with others) individually and as trustee. Damages were sought

for breach of contract ($300,000), a fraud claim against Greenberg, and punitive damages ($1,000,000). Apparently the plaintiffs sought to force a counterclaim by the trust on the Service note or to have the trust disclaim the right to proceeds of the note. It was asserted that Greenberg had agreed to do so. However, the plaintiffs voluntarily dismissed without prejudice this Suit No. 2 (March 18, 1988). The case had been pending about a year and four months.

Case No. 3 was filed December 3, 1966, in the District Court, Oklahoma County, Oklahoma, No. CJ-86-12734, Carolyn Wolfberg v. Robert Greenberg. trustee, and individually. It was also against all other trustees of Greenberg Trust and asked for an accounting, removal of trustees, dissolution of the trust and distribution of property. Damages were sought against Greenberg for breach of fiduciary duty and costs. Punitive damages were claimed in the amount of $10,000,000.

The court permitted an audit but no wrongdoing was found by the audit. A hearing was set on the summary judgment motion of the defendants in Case No. 3 for September 18, 1987, but the plaintiffs dismissed without prejudice on the day before the hearing date. The plaintiffs, however, persisted in basically the same claim, and so filed another suit in a Kansas state court (this is Case No. 4).

Case No. 4, District Court, Sedgwick County, Kansas, No. 88-C-3346, was filed September 16, 1988, and terminated February 15, 1990. In this Kansas case, which followed the voluntary dismissal of No. 3, Mrs. Wolfberg as the plaintiff sought the removal of trustees for hostility, but no damages were sought. No hostility by the trustees was found, but the court found that what hostility might exist was by Laurance Wolfberg toward his brother-in-law. The Kansas court held for Robert Greenberg, one of the named defendant-trustees.

The trial judge in No. 4 stated as to the hostility of Mr. Wolfberg that it "has been precipitated by Mr. Wolfberg's

mental illness, and which hostility has been apparently adopted by Mrs. Wolfberg." Appellant's App. at 298.

Case No. 5 was filed December 9, 1986 in the United States District Court for the Western District of Oklahoma by Greenberg as a co-trustee of the testamentary trust and by the other trustees to collect from Service Business Forms on the note described above. In this action Service Business Forms (then controlled by Wolfberg) asserted by a counterclaim served March 1987 basically the same cause advanced in Case No. 2. Thus it sought to avoid the note it had signed. The court granted summary judgment March 17, 1988 on the note against Service. An advisory jury found no agreement by Greenberg to file a disclaimer as to the note. Final judgment was entered for plaintiffs on March 14, 1988.

In No. 5, an appeal by Service was taken on the summary judgment. The court of appeals affirmed. A Petition for Certiorari was filed in the United States Supreme Court and denied on January 16, 1990.

A counterclaim is a "civil proceeding" for the purposes here considered. RESTATEMENT (SECOND) OF TORTS § 674.

Malicious Prosecution

There is nothing unusual about the cause of action for malicious prosecution under Oklahoma law. The Oklahoma Supreme Court in its response to our certification and in Young v. First State Bank, Watonga, 628 P.2d 707 (Okla.), set forth the elements. Thus the plaintiff in the malicious prosecution case must prove that the defendant:

1. initiated the proceedings, and each, if several proceedings are asserted as the predicate;

2. that the proceedings were motivated by malice, were without probable cause, and damaged plaintiffs;

3. that the proceedings (or separate causes within the proceedings) were concluded in plaintiffs' favor.

Oklahoma generally cites the RESTATEMENT (SECOND) OF TORTS (1977), and it at § 679 states in part as to malicious prosecution:

> "One who repeatedly initiates civil proceedings against another for the same cause of action is subject to liability for the harm caused thereby, if
>
> "(a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and
>
> "(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

Use of Multiple Predicate Suits

There is apparently no Oklahoma case law on a malicious prosecution action grounded on repetitive civil proceedings. In our view, the above quoted provisions would apply. To use such a predicate, the same basic cause of action should appear in each earlier component, and the elements stated above should be present in each of the earlier components. Each case must be separately evaluated as a condition to the use of an earlier adversely decided component as an element of proof in a later one.

Abuse of Process

Under Oklahoma law the elements of the tort of "abuse of process" are:

1. a misuse of process or misapplying it for a purpose for which it was not "designed" to accomplish;

2. use of process primarily for an improper purpose;

3. with damage to the plaintiff.

See Oklahoma Supreme Court Response, and PROSSER AND KEATON ON THE LAW OF TORTS, § 121, at 897 (5th Ed.).

When examining predicate cases it must of course be determined whether the process was wrongfully used. If in earlier proceedings there is proof of facts relevant to the motive in a later action, such facts may be used.

To repeat, the Oklahoma Supreme Court in its response to our certified questions, described the abuse of process cause of action's elements in Oklahoma:

> "The tort's elements are (1) the improper use of the court's process (2) *primarily* for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse. Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse if the court's process is used legitimately to its *authorized* conclusion."

(Footnotes omitted.) The Oklahoma Supreme Court also stated that the plaintiff in an abuse of process action is not required to prove that:

> (l) the underlying action was brought *without probable* cause or (2) that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded."

The Oklahoma Supreme Court also points out that the term "process" includes "the entire range of procedures incident to the litigation process," citing Nienstedt v. Wetzel, 651 P.2d 876 (Ariz.)

The elements of the tort of abuse of process, the factors, and their interaction are quite different from those in malicious prosecution proceedings. It is apparent that we are concerned only with the misuse of "process," and not with the commencement of actions. Thus the purpose

and authorized use of process for its accepted purpose, and to pursue it to a conclusion, although carried out with bad intentions, is not an abuse of process.

It is sufficient to refer to the response of the Oklahoma Supreme Court to our certification, and to Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379 (10th Cir.), and Gore v. Taylor, 792 P.2d 432 (Okla. Ct. App.).

Post-Trial Motions

After a seven-day trial and the jury verdict the defendants moved for a Judgment N.O.V., and also for a new trial (or for a remittitur of damages). The trial judge in his Order which denied the motions necessarily included an examination of the evidence as we must do to see whether the jury could properly have decided as it did. Sandlin v. Texaco, 900 F.2d 1479 (10th Cir.); Brown v. McGraw Edison Co., 736 F.2d 609 (10th Cir.). Also the court considered the challenge as to whether Oklahoma law was followed.

The Oklahoma case law as described above is quite clear that a predicate suit must be "terminated" in favor of the malicious prosecution plaintiff before a malicious prosecution case can be based on it in the ordinary situation. The very good reason stated for the requirement is that, as the Oklahoma Supreme Court said in the response to certification, "[t]o hold differently would be to countenance the possibility of countervailing results arising from the same action." But what should be the conclusion if this possibility cannot exist, thus, if the reason for the rule does not exist? In the case before us there exist some very unusual circumstances relating to this point, and these demonstrate that there can be no "countervailing" action.

As described, Case No. 2 was an action by Service Business Forms and the Wolfbergs filed November 26, 1986 in the Oklahoma state court as one of the three original cases filed in the first month. It concerned the note of Service given to the trust. This case was pending for about a year and four months and then dismissed without prejudice by Service Business Forms. When the case was

so dismissed Service Business Forms' counterclaim had been pending in the United States District Court of Oklahoma in Case No. 5 for about a year. This counterclaim raised the same issues on the note due the trust as were raised in Case No. 2. The counterclaim was filed in No. 5 which was a case filed by the trustees to collect on the note of Service. This issue on the note was decided in favor of the trustees in No. 5. Service Business Forms-Wolfbergs sought certiorari from the United States Supreme Court. This was denied in 1990. This would seem to have precluded a "countervailing" result on the issue in the voluntarily dismissed case. The issue was "concluded" favorably to Greenberg.

Considering dismissals we have also Case No. 3, one of the three original cases. It was filed on December 3, 1986 in the Oklahoma County state court by Mrs. Wolfberg against Greenberg and others. It sought removal of the trustees and $10,000,000 in damages. A preliminary audit developed nothing and the case was dismissed without prejudice the day before a hearing was to be held on the Greenbergs' summary judgment motion directed to the trustee removal issue.

Further, as to the dismissed Case No. 3, the same cause of action was begun by Mrs. Wolfberg in a Kansas state court. Again, this was for the removal of the trustees. This is Case No. 4 filed in September of 1988. This Kansas case was terminated in Greenberg's and the trustees' favor by a judgment on the removal issue. Thus the basic issue in Case No. 3 was raised by the Wolfbergs and litigated to a conclusion albeit in another court in Case No. 4, a conclusion favorable to Greenberg. As a consequence no "countervailing results" could arise from No. 3. The reason for "the Rule," not to consider dismissed actions, does not exist.

It seems reasonable under these very unusual circumstances described above that we must consider both of the cases voluntarily dismissed on the malicious prosecution and the abuse of process issues because there is not prevailing authority not to do so. The blanket exclusion of all cases voluntarily dismissed is not applicable.

As to the timing of the five cases, the record shows that in the last month of 1986 there were three cases pending; during most of 1987 there were four cases pending; during 1988 three cases were pending (except from March to September when two were pending); and in 1989 there were three cases which lasted into the first part of 1990.

Schedule of Cases

Case No.	1986	1987	1988	1989	1990
#1 Filed Nov. 3, 1986	U.S.D.C. W.D. Okla.	----------	----------	Cert. Denied Nov. 13, 1989	
#2 Filed Nov. 26, 1986	State Ct. Okla. Cty	----------	Dismissed March 18, 1988		
#3 Filed Dec. 3, 1986	State Ct. Okla. Cty.	Dismissed Sept. 18, 1987			
#4 Filed Sept. 16, 1988			State Ct. Kansas 1988	----------	Judgment Feb. 15, 1990
#5 Filed Dec. 9, 1986 (by the Trust)	U.S.D.C. W.D. Okla.	Counterclaim filed March 1987	----------	----------	Cert. Denied Jan. 16, 1990

Consideration of the "issue relationship" of the several cases in different courts and different states, together with the commencement by the Wolfbergs of three cases at the outset in about a thirty-day period, in a federal court and a state court, must have led the trial court to the conclusions and findings it expressed. These statements by the trial court were included in the trial transcript, but perhaps of more significance are those in its order of denial entered in response to the Motion of Judgment N.O.V. filed by the Wolfbergs which raised the issues which the court related to the evidence as well as to the law.

The Motion for Judgment N.O.V. by the Wolfbergs argues that the jury verdict is against the clear weight of the evidence, and that the law applied was contrary to that prevailing in Oklahoma. As mentioned, the trial court denied defendants' motions and also stated some conclusions in its ruling as to all the actions. Thus in part the court found, at page 6:

> "Defendant, Lawrence B, Wolfberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees."

And in the Order the trial court also stated:

> "Plaintiff alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, destroy his perceived position in the family
> . . . .

The court's reference to bringing Greenberg "to his knees" is from Plaintiff's Exhibit 44, a letter from Wolfberg to an attorney relative to action against the trust.

The court also apparently relied on Plaintiff's Exhibit 60, a letter wherein Wolfberg insisted in August 1989 that certiorari be sought in Case No. 1 by stating "based on business and overall legal strategy, this effort should be

made." The attorney had recommended that certiorari not be sought.

The trial court commented on the third suit brought by these defendants in its Order at page 6:

> "The court notes that the management of the third lawsuit in Oklahoma County was particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis. Defendants' tactic was to continually extend and delay the proceeding at the expense of all the parties involved. Once defendants faced a firm Oklahoma County hearing date on the now-plaintiff's motion for summary judgment, defendants chose to dismiss the suit the day before the scheduled meeting. Shortly thereafter, defendants refiled the same action in District Court of Kansas."

The trial court found:

> "The Court adds that there was no evidence that the current plaintiff, Robert I. Greenberg, had not been sued in his personal capacity throughout all the subject lawsuits."

We agree with this finding since all the suits were directed to him personally and to his position or interests.

Conclusion on Principal Issues

We do not adopt the trial court's position that it was a "unitary action" for all purposes. However, it is apparent that the same purposes, intent, and wilful acts by the defendants herein were applicable and controlled the bringing, timing, and the pursuit of all the predicate suits. The dismissal of suits with the repetition of issues in new filings appears to be an attempt to avoid the traditional abuse of process doctrines, but in our view had the opposite effect, as did the use of different jurisdictions. The process was used for "an ulterior or improper motive" causing damage to this plaintiff in each instance.

In this conclusion it is not necessary to again describe the evidence as it has been referred to and quoted above as it relates to both causes of action. This pervaded the series of cases. We have described the "issue relationship" of the several cases, and noted the sequence, the number of cases pending at any one time, and the time span from the end of 1986 to the first part of 1990. Further, we agree with the trial court's determination that the cases were not commenced by defendants nor conducted by them for any proper purpose. As the trial court determined, and we again quote:

> "Defendant, Lawrence B. Wolfberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees."

When the predicate suits are each separately examined as Oklahoma law directs, with the inclusion of the specific and above overall and continuing actions, intent, and purpose of the defendants in each case, the conclusion must be reached that all the elements of both abuse of process and of malicious prosecution as hereinabove described have been established.

Other Issues

Defendants seek a new trial based on an asserted trial error. Mrs. Wolfberg testified at trial that she had not asked her brother (Greenberg), as a trustee of the trust described above, for money from the trust. She was questioned regarding a statement made in a deposition which may have been to the contrary, but she testified that she did not ask her brother.

The trial court's ruling in question however came during the testimony of one of Mrs. Wolfberg's attorneys. He was asked about an answer to an interrogatory he had prepared for Mrs. Wolfberg in Case No. 3 and signed by her. This answer stated that she had asked her brother for money from the trust. The contradiction was raised during

the questioning of Mrs. Wolfberg's attorneys (as mentioned). The trial judge stopped the testimony of the attorney, pointed out the testimony of Mrs. Wolfberg that she had never asked, and stated that if Mrs. Wolfberg's testimony at the trial in progress was that she had not asked for money then it was a "judicial admission" that is conclusively established. The court admonished the jury:

> "[A] party litigant may not advance a contention in trial which is inconsistent with her testimony at that trial. The testimony at trial constitutes what's known in law as a judicial admission, by which a party is bound . . . . I advise you that Mrs. Wolfberg may not advance any contention in this case to the effect that she ever asked Robert I. Greenberg, as trustee, for the disbursement of any money to her."

The judge thus held that the defendants could not advance the "contention" that Mrs. Wolfberg had asked for money. All parties and the trial judge in his order on the post-judgment motions agree that this characterization of the statement of Mrs. Wolfberg was not correct.

Further as to the ruling, no evidence was advanced that Mrs. Wolfberg needed an emergency advance from the trust. The evidence showed she had a substantial balance in her bank account ($80,000.00), and was receiving a monthly advance.

The ruling, of course, prevented her from taking the position that she had asked for money but the record shows this was not significant. She had acknowledged the facts on which the court ruled, and the consequence of the ruling was not significant under the circumstances. The ruling was directed to the jury as a legal rule or procedural rule and was not presented, as Appellants urge at length, as an opinion as to Mrs. Wolfberg's veracity. We must conclude that the error was harmless. See Kotteakos v. United States, 328 U.S. 750, 776 (error is harmless where it does not have a "substantial and injurious effect" on the outcome).

Limitations

Malicious Prosecution

The Oklahoma statutes expressly provide that the period of limitation for an "action" for malicious prosecution is a year. 12 O.S. § 95 (1991). This is within one year "after the cause of action shall have accrued." § 95. Rutherford v. Halliburton Co., 572 P.2d 966 (Okla.).

A cause of action in Oklahoma accrues when a plaintiff could have first successfully maintained the cause. Each predicate is considered. The period of limitations does not start to run until the predicate case is no longer pending or the time for appeal has expired. Coleman v. Strong, 232 P. 378 (Okla.)

This action was filed on August 14, 1090. As shown below, this is within one year of the termination of each predicate action.

Limitations

Abuse of Process

The Oklahoma statutes make no specific provisions for a period of limitations for abuse of process actions. The Oklahoma Supreme Court in its response to our questions has stated that it must be placed in the two year period of 12 O.S. § 95(3) (1991) for those actions "not enumerated."

The cause of action arises-accrues, the court says, "when the process is abused and damages are incurred, *regardless of when the action is determined.*" The court also stated:

> "The court may find earlier components of the Process [as defined by the certifying court] relevant as proof of an ulterior or improper motive in a subsequent action."

The record shows, as hereinabove mentioned, the predicate actions:

No. 2-4 - terminated Kansas state court February 15, 1990.

No. 1 - certiorari denied November 13, 1989.

No. 3-5 (counterclaim), certiorari denied January 16, 1990.

We must hold that the action before us was commenced, as to both causes, within the Oklahoma limitations periods.

Other Issues

The Appellants urge that as to the abuse of process issue in this case the evidence did not show "wilful acts," nor did the pleading make such an assertion. In our view, there was adequate evidence of "wilful acts" -- acts not authorized by "the process." There was adequate evidence of this element. Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379 (10th Cir.); Gore v. Taylor, 792 P.2d 432 (Okla. Ct. App.); Neil v. Pennsylvania Life Ins. Co., 474 P.2d 961 (Okla.).

We have considered above the trial ruling as to testimony of Mrs. Wolfberg which characterized for the jury some as a "judicial admission." This was incorrect, as the trial court later acknowledged. This error was not significant, did not demean her, and is not ground for reversal.

The award of punitive damages is challenged as excessive considering the defendants' net worth. We do not find in the record a basis for this argument of defendants. The Oklahoma statute does not violate due process as the Appellants urge. We have considered the statute or a similar statute in prior cases. See John A. Henry & Co. Ltd. v. T.G.&Y. Stores Co., 941 F.2d 1068 (10th Cir.), and Silkwood v. Kerr-McGee, 769 F.2d 1451 (10th Cir.). The evidence to support the general damages verdict was sufficient considering the time, litigation involved, and the evidence that plaintiff was unable to properly take care of his business and had emotional problems resulting from the ongoing litigation.

The judgment of the United States District Court for the Western district of Oklahoma herein appealed from is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT I. GREENBERG,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 92-6023
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants-Appellants.	)	

ORDER
Entered June 16, 1993

Before TACHA, SETH, and BALDOCK, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

rehearing in banc, Rule 35, Federal Rule of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT I. GREENBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-90-1302-A
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants.	)	

ORDER

Before the Court are Defendants' Motion For Judgment Notwithstanding The Verdict, Or For, Certification To The Oklahoma Supreme Court; and Motion For A New Trial, Or For, A Remittitur Of Damages. The Court tried this case to a jury in seven days of exhausting testimony and exhibits. After conscientious deliberations, the jury returned a verdict for plaintiff, Robert Greenberg, on the grounds of malicious prosecution and abuse of process.

Plaintiff, Robert I. Greenberg, was successful in proving that over a four year period, defendants maintained a series of damaging lawsuits against plaintiff. Plaintiff's [sic] alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, destroy his perceived position in the family, acquire business property at reduced prices, avoid payment on a trust note, obtain release of trust shares, force the resignation of the trustees of Mal Greenberg's estate, and force plaintiff to relinquish any benefits he may receive from payment of the note to the trust. Plaintiff was successful in persuading the jury that this series of actions together constituted a malicious prosecution and abuse of process claims.

Defendants, Laurance B. Wolfberg and Carolyn Wolfberg (hereinafter "the Wolfbergs"), move for

judgment notwithstanding the verdict (hereinafter "JNOV") in their favor. Defendants allege that there was insufficient evidence presented at trial for the jury to find in plaintiff's favor. In the alternative, the Wolfbergs move the Court to certify two legal questions to the Oklahoma Supreme Court for an advisory opinion, pursuant to Okla. Stat. tit. 20 § 1601 et seq. In separate motions defendants' [sic] move for an order granting a new trial on the grounds that the Court committed clear error, or in the alternative, for the Court to order a remittitur of damages awarded by the jury.

STANDARDS FOR MOTIONS JNOV AND NEW TRIAL

"Motions for a directed verdict and for JNOV are considered under the same standard." Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498 (10th Cir. 1984). The standard was summarized by the Tenth Circuit in Rajala v. Allied Corp., 919 F.2d 610 (10th Cir. 1990), cert. denied, 111 S. Ct. 1685 (1991). The test is whether there is sufficient evidence presented at trial for the jury to properly return a verdict for the party opposing the motion for directed verdict. Id. at 615. In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury," but rather "must view the evidence most favorably to the . . . [nonmoving] party and give that party the benefit of all reasonable inferences from the evidence." Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984); accord, Sandlin v. Texaco Ref. & Mktg., Inc., 900 F.2d 1479, 1483 n.5 (10th Cir.), cert. denied, 111 S. Ct. 252 (1990).

As a condition precedent to a motion JNOV, a motion for directed verdict must be made at the close of all the evidence. United States ex rel. Roger IBG v. Reisz, 718 F.2d 1004, 1007 (11th Cir. 1983); Special Promotions, Inc. v Southwest Photos, Ltd., 559 F.2d 430, 432 (5th Cir. 1977); Fed. R. Civ. P. 50(b) advisory committee's note ("A motion for judgment notwithstanding the verdict will

not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.").[1]

In ruling on a motion for new trial, the Court may only set aside the jury's verdict when it concludes the verdict was against the great weight of the evidence or when prejudicial error has been entered into the record. McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990). A "jury verdict must not be preempted unless it has no basis in fact." United States v. Fenix & Scisson, Inc., 360 F.2d at 262. Moreover, the mere fact that the jury could have drawn different inferences or conclusions, or the fact that the Court believes that another result is more reasonable is no basis for granting a new trial. Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 186 (8th Cir. 1972) (citing Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944)), cert. denied, 410 U.S. 930 (1973).

The district court's ruling on a motion for directed verdict or for JNOV is reviewed de novo by the Tenth Circuit, applying the same standard as that used by the district court of the first instance. Rajala v. Allied Corp., 919 F.2d at 615; Sandlin v. Texaco Ref. & Mktg., Inc., 900 F.2d at 1483 n.5; Brown v. McGraw-Edison Co., 736 F.2d at 613. The district court's ruling on either a motion for directed verdict, or for, JNOV is reviewed de novo by the appellate court, and a ruling on a motion for new trial is reviewed for manifest abuse of discretion. These two appellate standards were clearly delineated by Chief Judge Holloway in Brown v. McGraw-Edison Co., 736 F.2d at 609, and have frequently been restated. See N. Simmons, Tenth Circuit Court of Appeals Desk Book: Standards of Appellate Review at 27-28 (1988).

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[1]The record reflects that a motion for a directed verdict was entered by defendants [sic] counsel at the close of all evidence.

MOTION FOR JNOV

Defendants state that the Court should enter JNOV in their favor because the jury's verdict, consisting of malicious prosecution and abuse of process findings, cannot stand because it is against the clear weight of the evidence. Defendants' arguments in support of their motion for JNOV are strikingly similar to those made to the Court in a motion for summary judgment.[2] In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), the Supreme Court stated that the standard for motions JNOV and new trial mirrors that of summary judgment. The 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made after all the evidence that has been admitted. Id. None of the evidence presented during this trial would tend to overcome the Court's previous ruling, so the Court stands by its June 3, 1991, Order denying summary judgment on this same issue. The Court adds that there was substantial evidence presented at trial for the jury to properly return a verdict for plaintiff.

Defendants' [sic] also assert that the abuse of process judgment is time barred. Upon review of the arguments presented in this motion, the Court reiterates its position that these lawsuits are to be viewed as a whole, rather than as discrete lawsuits. Under this assumption, the statute begins to run with the termination of the fifth lawsuit. The November 13, 1989, denial of the writ of certiorari on the fifth lawsuit constituted an appeal of the Tenth Circuit's decision by defendants. The application for the writ of certiorari by defendants prevented the statute from beginning to toll, so the complaint in this case is timely.

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[2]At issue in the June 3, 1991, summary judgment order, was the cause of action for malicious prosecution alone, and not abuse of process.

Defendants are estopped from seeking to avoid the consequences of their decision to vigorously pursue their Supreme Court appeal, in spite of the fact that it has created the unintended result of tolling the time bar.

Defendant, Lawrence B. Wolberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees. The voluntary dismissal of the third lawsuit filed, on December 3, 1986, in the District Court of Oklahoma County does not provide defendants with a defense in this present action because subsequent to its dismissal defendants refiled and lost the same lawsuit in the Eighteenth Judicial District, District Court of Sedgwick County, Kansas.

The Court notes that the management of the third lawsuit in Oklahoma County was particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis. Defendants' tactic was to continually extend and delay the proceeding at the expense of all the parties involved. Once defendants faced a firm Oklahoma County hearing date on the now-plaintiff's motion for summary judgment, defendants chose to dismiss the suit the day before the scheduled meeting. Shortly thereafter, defendants refiled the same action in District Court of Kansas. If this type of conduct lies outside any tort remedy, there would be an intolerable lacuna in favor of malicious prosecution litigants.

The Court adds that there was no evidence that the current plaintiff, Robert I. Greenberg, has not been sued in his personal capacity throughout all the subject lawsuits. Plaintiff qualifies as the target of these lawsuits because the treatment he suffered was indistinguishable from that of a target or a personal defendant. Defendants [sic] Motion For JNOV is thereby denied.

MOTION FOR CERTIFICATION OF LEGAL QUESTION

Defendants ask this Court to certify to the Oklahoma Supreme Court questions concerning plaintiff's theory of liability. In keeping with the Court's earlier Order denying certification, the Court declines to certify these issues to the Oklahoma Supreme Court. The Court chooses to let its previous rulings on these issues stand. Oklahoma law supports this position by permitting the denial of certification if a substantial portion of the issues proposed for certification are without probable cause. Okla. Stat. tit. 20 § 1601 et seq. Defendants' Motion For Certification is denied.

MOTION FOR A NEW TRIAL

Defendants contend that a new trial is mandated because the Court committed prejudicial error. The Court ruled that Mrs. Wolfberg's testimony concerning whether she had or had not asked plaintiff for money amounted to a "judicial admission." Defendants are correct in stating that trial testimony can never be a judicial admission. See Hartford Fire Insurance Co. v. Carter, 196 F.2d 992, 996 (10th Cir. 1952). However, this is harmless error that does not mandate a new trial.

This error was harmless because there was no evidence in the record showing that financial troubles necessitated reaching the corpus of the trust. The Court concluded, after some protracted courtroom testimony from Mrs. Wolfberg, that she had deliberately attempted to skirt these financial issues. In support of this position, the Court notes that if defendants had financial troubles the money requests from plaintiff would be a significant point of contention for Mrs. Wolfberg and that it would be logical for Mrs. Wolfberg to testify concerning these matters in Kansas. The Court notes, however, that Mrs. Wolfberg curiously elected not to clarify these issues by testifying. These facts support the Court's conclusion that this error was harmless to the jury's overall verdict.

The Court may only set aside the jury's verdict when it concludes that the verdict is against the great weight of the evidence or when prejudicial error has entered into the record. McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990). The mere fact that the jury could have drawn different inferences or conclusions, or the fact that the Court believes that another result is more reasonable is no basis for granting a new trial. Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 186 (8th Cir. 1972) (citing Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944)), cert. denied, 410 U.S. 930 (1973). In lieu of these authorities, the Court concludes that the error entered on the record will not overcome the burden necessary for granting a new trial. Defendants' Motion For A New Trial is denied.

MOTION FOR REMITTITUR OF DAMAGES

Finally, defendants allege that the judgment cannot stand because the damages evidence presented to the jury was insufficient to support their verdict. Defendants also allege that the actual damages awarded by the jury are not stated with the requisite specificity to sustain the punitive damages award. The Court disagrees. The record is replete with evidence of the net worth of the parties; and, this evidence was sufficient to allow the jurors to calculate their damages award with requisite specificity. Testimony concerning the profit on the Wolfbergs' home alone could leave the jurors with ample information to base their damages awards on. In addition, the Wolfbergs' self-described "smart money" had to have been enough to genuinely smart any budget. Finally, the Court concludes by stating that there is no evidence that the punitive damages awarded were excessive. Defendants' Motion For Remittitur Damages is hereby denied.

IV. CONCLUSION

Accordingly, defendants Motion For JNOV, Certification To The Oklahoma Supreme Court, Motion For A New Trial, and Motion For A Remittitur Of Damages, are DENIED, and the judgment shall stand.

It is so ordered this 24th day of December, 1991.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX D

Robert I. GREENBERG,
Plaintiff-Appellee,

v.

Laurance B. WOLFBERG and Carolyn Wolfberg, Defendants-Appellants.

No. 81416

Supreme Court of Oklahoma.

Dec. 20, 1994

As Corrected Jan. 3, 1995.

OPALA, Justice.

The United States Court of Appeals for the Tenth Circuit [certifying court] certified the following questions pursuant to the Uniform Certification of Questions of Law Act, 20 O.S. 1991 §§ 1661 et seq.:

> 1. In light of the facts as detailed below that the Defendants Laurance B. Wolfberg and Carolyn Wolfberg either individually or combined instituted four separate lawsuits and filed one counterclaim against the Plaintiff Robert I. Greenberg or against a party with which Mr. Greenberg was in privity, may the four separate suits and the counterclaim be considered as a single suit (the "Process") for purposes of alleging malicious prosecution and abuse of process claims regardless of the varied disposition and success of the various separate actions?
>
> 2. Closely related to question 1 is whether the statute of limitations applicable to both the malicious prosecution and abuse of process claims should be applied to each individual action or to the process?
>
> 3. With respect to the abuse of process claim, does the statute of limitations begin to run with the

commencement or the termination of each individual action or of the Process?

4. What is the duration of the statute of limitations on an abuse of process claim?

We answer the certified questions as follows: (1) The availability of a multi-componential predicate for the torts of malicious prosecution and abuse of process[1] is determined by analyzing the proceedings in each *component* case. While *malicious prosecution* may be predicated upon *multiple litigation,* a malicious-prosecution plaintiff may not recover *actual damages* for proceedings that terminated *dehors* the applicable statutory limitation. (2) The time bar for both delicts pressed in federal court must be applied on a case-by-case basis. Nonetheless, those components of the "Process"[2] barred by limitation may be *relevant* in proving a case to recover for successive proceedings. The relevancy goes to the elements of probable cause, malice or punitive damages. (3) Viewing the third question as asking of us when the statute of limitation for an abuse-of-process claim commences, we answer that the limitation period begins when the abuse-of-process claim *accrues—i.e.,* when a plaintiff could have *"first* maintained the cause to a successful result."[3] (4) The statutory limitation for an abuse-of-process claim is two years.

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[1]Malicious prosecution and abuse of process are *common law actions* uninvaded and unmodified by this State's statutory regulations.

[2]*See* Part II, *infra,* for identification and explanation of the components of the "Process", as that term is used in the certified questions.

[3]*Neff v. Wilmott, Roberts & Looney,* 170 Okl. 460, 41 P.2d 86, 87 (1935).

I

THE ANATOMY OF FEDERAL LITIGATION[4]

Robert I. Greenberg [Greenberg or malicious-prosecution plaintiff] and Carolyn Wolfberg [malicious-prosecution defendant] are the children of Mal and Rose Greenberg. They are both potential beneficiaries of the Mal Greenberg Residual Trust. Greenberg is one of the trustees of that trust. While at his mother's death Greenberg is to receive his share of the residual trust outright, Carolyn is to have only the interest accruing on the trust's principal that remains after distribution to Robert.

In the 1970's Laurence B. Wolfberg [Wolfberg or malicious-prosecution defendant], Carolyn's husband, and Greenberg acquired interests in several business partnerships including, among others, Service Business Forms, Griffith Resources and Green Wolf Oil Company. In 1982 Greenberg and Wolfberg decided to sever their business ties. After effectuating this decision the parties engaged in a series of five forensic battles commencing in November 1986. Upon the culmination of these actions Greenberg brought suit on August 14, 1990 against the Wolfbergs for malicious prosecution and abuse of process. Judgment in Greenberg's favor was entered on October 8, 1991; the Wolfbergs appealed to the U.S. Court of Appeals for the Tenth Circuit, the certifying court.

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[4]The material accompanying the certified questions consists of the parties' briefs to the U.S. Court of Appeals for the Tenth Circuit. The factual recitals in the anatomy of federal litigation and in the discussion of the components of the Process were gleaned from this material and from the briefs submitted to this court.

II

THE COMPONENTS OF THE "PROCESS" IN THE SENSE DEFINED BY THE CERTIFYING COURT

In its proffered questions the certifying court defines the four predicate suits and one counterclaim between the litigating parties as the "Process". The components of the Process are as follows:

COMPONENT A:

Laurance B. Wolfberg v. Robert I. Greenberg, Cause No. CIV-86-2441-P, in the U.S. District Court for the Western District of Oklahoma, filed on November 3, 1986. In this action Wolfberg sought (a) an accounting for the profits and losses of Green Wolf Oil Company, a partnership, and (b) that partnership's dissolution. He also sought recovery for Greenberg's breach of fiduciary duties owed to this partnership. While Wolfberg prevailed in pressing for an accounting and dissolution of the partnership, he lost to Greenberg on the breach-of-duty theory. After appellate review by the certifying court, the U.S. Supreme Court denied certiorari on November 13, 1989.

COMPONENT B:

Service Business Forms Industries, Inc., Service Computer Forms Industries, Inc., Laurance B. Wolfberg and Carolyn Wolfberg v. Robert I. Greenberg, individually and as co-trustee under the Mal Greenberg Testamentary Trusts et al., Cause No. CJ-86-12606, in the District Court of Oklahoma County, filed November 26, 1986. The plaintiffs asserted four causes of action against Greenberg, individually and as trustee of the Mal Greenberg Testamentary Trusts. The claims dealt primarily with an asserted failure of consideration to support the stock redemption plan for the Mal Greenberg Testamentary Trusts' stock in Service Business Forms. By March 18, 1988 all causes stood dismissed *without prejudice.*

COMPONENT C:

Carolyn Wolfberg v. Robert I. Greenberg, individually and as co-trustee under the Mal Greenberg Testamentary Trusts et al., Cause No. CJ-86-12734, in the District Court of Oklahoma County, filed on December 3, 1986. Carolyn Wolfberg sought recovery for (1) Greenberg's breach of fiduciary duties owed to her by him as a trustee of the Mal Greenberg Residual Trust and (2) Greenberg's intentional infliction of emotional distress. The suit was dismissed *without prejudice* on September 17, 1987.[5]

COMPONENT D:

Carolyn Greenberg Wolfberg v. Robert I. Greenberg as co-trustee under the Mal Greenberg Testamentary Trust et al., Cause No. 88-C-3346, in the District Court, Sedgwick County, Kansas, filed on September 16, 1988. Carolyn Wolfberg sought the removal of the Mal Greenberg Testamentary Trust trustees because of their "prolonged and continued hostility and animosity" towards her. Judgment was entered for the defendants on January 25, 1990.

COMPONENT E:

Robert I. Greenberg as co-trustee of the Mal Greenberg Testamentary Trusts et al. v. Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc., Cause No. CIV-87-2769-A, in the U.S. District Court for the Western District of Oklahoma, filed on March 16, 1987. The trustees sought judgment on the defendants' note given as consideration in a stock redemption plan. The defendants counter-claimed against Greenberg, alleging he had relinquished his right to any monies due the trust under the note's term. Partial summary judgment, entered on March 14, 1988, and the final judgment of March 25,

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[5]For an explanation of the legal effect of a dismissed lawsuit (without prejudice) as a malicious-prosecution predicate, *see infra* note 40.

1988 went to the plaintiffs. The latter parties prevailed on all issues. The appellate process came to an end when the U.S. Supreme Court denied certiorari on January 16, 1990.

III

THE NATURE OF THIS COURT'S FUNCTION WHEN ANSWERING CERTIFIED QUESTIONS FROM A FEDERAL COURT

While we can set the parameters for the permissible use of (multiple) successive proceedings as a predicate for malicious prosecution, this court's assessment of the evidence adduced at the trial of this cause is beyond the allowable bounds of its responsibility. It is not this court's province to intrude (by responses to the certified questions) upon the federal court's decision-making process. Because *the case* is not before us for decision, we refrain from applying the given state-law responses to the facts elicited in the federal-court litigation or from passing upon the effect of federal procedure on the record and the issues in the case.[6]

IV

EXCEPT AS ALTERED BY OKLAHOMA'S CONSTITUTION AND HER STATUTES, THE COMMON LAW REMAINS IN FULL FORCE

To the extent that statutory provisions and this court's jurisprudence construing them do not yield complete answers to the questions posed, we have reached for this State's declared common law to supplement the responses

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[6]*Bonner v. Oklahoma Rock Corp.*, Okl., 863 P.2d 1176, 1178 n. 3 (1993); *Shebester v. Triple Crown Insurers*, Okl., 826 P.2d 603, 606 n. 4 (1992).

sought. By the mandate of 12 O.S. 1991 § 2[7] *the common law remains in full force unless a constitutional clause or a statute explicitly provides to the contrary.* The common law's legislative abrogation may not be effected by mere *implication;*[8] it must be clearly and plainly expressed.[9] A presumption favors the preservation of common-law rights.[10] In this State's legal tradition the common law forms "a dynamic and growing" body of rules that changes with the conditions of society.[11]

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[7]The relevant terms of 12 O.S. 1991 § 2 provide:

> "the common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma. . . ."

[8]*Tate v. Browning-Ferris, Inc.*, Okl., 883 P.2d 1218, 1225-26 (1992); *Silver v. Slusher*, Okl., 770 P.2d 878, 884 (1989); *Ricks Exploration v. Okl. Water Resources Bd.*, Okl., 695 P.2d 498, 504 (1985); *Roxana Petroleum Co. v. Cope*, 132 Okl. 152, 269 P. 1084, 1085 (1928) (the court's syllabus ¶ 3); *Reaves v. Reaves*, 15 Okl. 240, 82 P. 490, 495 (1905); *State Mut. Life Assur. Co. of Amer. v. Hampton*, Okl., 696 P.2d 1027, 1034, 1036 (1985) (Opala, J., concurring).

[9]*Fuller v. Odom*, Okl., 741 P.2d 449, 451 (1987); *McCormack v. Oklahoma Pub. Co.*, Okl., 613 P.2d 737, 740 (1980); *Reaves, supra* note 8, 82 P. at 495; *Hampton, supra* note 8 at 1036 (Opala, J., concurring).

[10]*Reaves, supra* note 8, 82 P. at 495; *Hampton, supra* note 8, 82 P. at 1036 (Opala, J., concurring).

[11]*Brigance v. Velvet Dove Restaurant, Inc.*, Okl., 725 P.2d 300, 303 (1986), quoting *McCormack, supra* note 9 at 740. *See also Vanderpool v. State*, Okl., 672 P.2d 1153, 1157 (1983).

V

MALICIOUS PROSECUTION

A majority of American courts concur in the notion that if the elements which comprise malicious prosecution are met and material damages are demonstrable, a plaintiff may prevail upon this cause of action *without having to prove special injury or grievance.*[12] Our jurisprudence clearly accords with this view. We do not recognize *interference with the person*[13] *or property*[14] of another as a required element for pressing this delict. The special-injury requirement stands supplanted by the malicious-prosecution plaintiff's heavy burden of proof. This onus serves to shield legitimate resort to the courts from subjection to vexatious litigation[15] and is consistent with our announced policy that disfavors this tort rubric.[16]

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[12]*See* W.L. PROSSER AND W.P. KEETON, THE LAW OF TORTS § 120, at 890-91 (5th ed. 1984).

[13]Examples of proceedings interfering with the person include, among others, lunacy, contempt, bastardy, juvenile delinquency and arrest under civil process. *See* PROSSER AND KEETON, *supra* note 12 at 890.

[14]Examples of proceedings interfering with a person's property include, among others, garnishment, replevin, attachment, the search of premises under a warrant, injunctions, proceedings in bankruptcy and for dissolution of a partnership. *See* PROSSER AND KEETON, *supra* note 12 at 890-91.

[15]*See* PROSSER AND KEETON, *supra* note 12 at 890.

[16]*Glasgow v. Fox*, Okl., 757 P.2d 836, 839 (1988); *Young v. First State Bank, Watonga*, Okl., 628 P.2d 707, 709 (1981); *Williams v. Frey*, 182 Okl. 556, 78 P.2d 1051, 1056 (1938).

A

The Elements of the Tort

We initially delineate the elements of *malicious prosecution drawn from proof supplied by multiple civil proceedings*. Identification of the constituent elements is *central* to consideration of the first certified question. It is only when the requirements for maintaining this tort are met that a malicious-prosecution claim arises and the running of limitation is triggered. While our jurisprudence has not previously addressed the question whether a malicious-prosecution claim can be based upon repetitive civil proceedings, the national body of the common law affords ample sources to guide our task.[17] It recognizes the delict of malicious prosecution based upon a *multi-componential predicate*, where a party (1) has brought successive suits against the same person upon *the same cause of action* after an adverse decision which should have ended the controversy *or* (2) has filed separate actions upon the *same claim*.[18] We recognize today RESTATEMENT

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[17]*See* RESTATEMENT (SECOND) OF TORTS § 679 (1977) which states in pertinent part:

> "One who repeatedlly initiates civil proceedings against another for the same cause of action is subject to liability for the harm caused thereby, if
>
> (a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against who they are brought."

[18]*See* RESTATEMENT (SECOND) OF TORTS § 679 comment b (1977). It makes § 679 applicable not only (a) when the original

[Footnote continued on next page]

(SECOND) OF TORTS § 679[19] as the correct exposition of this State's common law.[20]

For the use of a multi-componential predicate in malicious prosecution *the same cause of action* must have been asserted in each component. The plaintiff must prove the malicious-prosecution defendant (1) initiated the proceedings[21] embraced within the multi-componential

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plaintiff is relitigating a claim which has been decided adversely to that plaintiff but also (b) when a number of separate proceedings for the same cause of action are initiated by a legal entity.

[19]For the text of RESTATEMENT (SECOND) OF TORTS § 679, see *supra* note 17.

[20]Restatements of the common law on chosen subjects, which are produced by the American Law Institute, a private national organization of judges, practitioners, and law teachers, are scholarly "*codifications of American common law in various substantive law areas, based upon the decisions of the courts of last resort of the states.*" (Emphasis added.) Winters, The Contribution of Professional Organizations to Stability and Change Through Law 265, 269 (1963). For a history of the Institute, see Goodrich, The Story of the American Law Institute, 1951, Wash. U.L.Q. 283; *see also* Krause, Gans, 1 The American Law of Torts § 1:18 at 61 (1983); PROSSER AND KEETON, *supra* note 12, § 3 at 17.

[21]"*Proceeding*" here includes "*counterclaim*". *See* RESTATEMENT (SECOND) OF TORTS § 674, comment a, which states:

[Footnote continued on next page]

predicate and these proceedings were (2) brought *without* probable cause, (3) motivated by malice, (4) terminated in the plaintiff's favor and (5) damaging to the plaintiff.[22]

While *earlier* components of the predicate may serve as an element's proof in a *later* proceeding, *each individual suit* must satisfy the critical elements of (a) initiation by the malicious-prosecution defendant, (b) termination favorable to the malicious-prosecution plaintiff and (c) lack of probable cause.[23] There is an exception to the lack-of-

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> "Since the term 'civil proceedings' includes a counterclaim, one who files a counterclaim to a cause of action initiates a civil proceeding."

See also 12 O.S.1991 § 2013 for Oklahoma's statutory treatment of counterclaims.

[22]*Reeves v. Agee*, Okl., 769 P.2d 745, 752 (1989); *Young v. First State Bank, Watonga*, Okl., 628 P.2d 707, 709 (1981); *Page v. Rose*, Okl., 546 P.2d 617, 620 (1976); *Browning v. Ray*, Okl., 440 P.2d 721, 724 (1968); *Towne v. Martin*, 196 Okl. 510, 166 P.2d 98, 100 (1945); *Sawyer v. Shick*, 30 Okl. 353, 120 P. 581, 582 (1911).

[23]The court in *Sawyer, supra* note 22, 120 P. at 582, drew a critical distinction between malice and want of probable cause when it observed:

> "Malice may be inferred from a total want of probable cause, but, *e converso*, a total want of probable cause cannot be inferred from malice."

[Footnote continued on next page]

probable-cause requirement where an earlier action, although brought with probable cause, is decided adversely to the malicious-prosecution defendant.[24] There, if successive suits are brought on the same cause of action, the plaintiff may use the *earlier*, adversely-decided action to prove one or more of the § 679 tort's elements. Nonetheless, *no actual damages* may be recovered for the earlier action if it was brought *upon* probable cause.[25]

B

Initiation of the Action by the Malicious-Prosecution Defendants

In the five components of the Process there are four separately identified plaintiffs—Laurance B. Wolfberg, Carolyn Wolfberg, Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc. To combine these components into a "single suit" requires an inquiry into the relationship of the various plaintiffs, each to the other. Where there is (1) a common claim asserted in the

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See also Browning, supra note 22 at 725, where it was held that if the evidence establishes that an action was instigated *without* probable cause, malice may be implied or inferred.

[24]For a discussion of the basis for the exception, see Subpart (V)(C), *infra*.

[25]Our jurisprudence recognizes that probable cause is a complete defense to a malicious-prosecution claim. *See Page, supra* note 22 at 620. To allow recovery for a suit brought upon probable cause would undermine this rule of law.

components of the Process[26] and (2) privity of interest or estate between the parties who initiated the suits,[27] the actions can be combined to assert a malicious-prosecution claim. Disparity among the identities in which a malicious-prosecution plaintiff is sued can also be resolved by the same analysis. If there is a privity of interest or estate among the different legal entities by which the malicious-prosecution plaintiff was haled into court, that plaintiff may combine the proceedings as a predicate to allege the delict if the component suits are based upon a common cause of action.

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[26]*See Shedd v. Patterson*, 301 Ill. 355, 134 N.E. 705, 707 (1922); *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945); *Ripley, infra* note 31, 198 S.W.2d at 864 (the plaintiff alleged that where a defendant initiated a series of suits for the *same cause of action*, it amounted to harassment; and he prevailed upon the delict of malicious prosecution); *Trueman Fertilizer Company v. Stein*, 84 So.2d 570, 572 (Fla. 1956) (malicious prosecution lies where, after a previous adverse decision, the malicious-prosecution defendant brings successive suits against the same person upon the same cause of action).

[27]*See Cartwright v. Atlas Chemical Industries, Inc.*, Okl., 623 P.2d 606, 611 (1981), where the court held that (a) "nominal parties to an action" include those who "have control of the prosecution or defense in furtherance of their own interest and who enjoy, because of factual circumstances, all the rights of an actual party," and (b) that a person meeting these criteria is a "*privy in interest*". *Id.* at 611. *See also Soffos, supra* note 26 at 682; *Ripley, infra* note 31, 198 S.W.2d at 864.

C

Lack of Probable Cause

Greenberg has the affirmative duty of proving[28] that the malicious-prosecution defendants brought the component actions *without probable cause*.[29] In pressing malicious prosecution based upon multiple civil proceedings, one could encounter an *earlier* component of the Process which may have been filed *with* probable cause.[30] Nevertheless,

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[28]Here the burden of proof is by a *preponderance of the evidence*. *Young, supra* note 16 at 712.

[29]*Probable cause* is a reasonable belief in the existence of the facts upon which the claim is based and a reasonable belief that under such facts the claim may be valid either at common law or under an existing statute. *Young, supra* note 16 at 710-12; *Lewis v. Crystal Gas Company*, Okl., 532 P.2d 431, 433 (1975); *Towne, supra* note 22, 166 P.2d at 100; *Gray v. Abboud*, 184 Okl. 331, 87 P.2d 144, 147 (1939). Where the facts which relate to the existence of non-existence of probable cause are admitted and support but a single inference, whether they constitute probable cause is a question of law for the court's determination. *Robberson v. Gibson*, 62 Okl. 306, 162 P. 1120, 1124 (1917).

[30]In assessing whether the malicious-prosecution defendant had probable cause to bring the component actions, the trial court must inquire whether the advice of counsel was honestly sought and acted on in good faith by the malicious-prosecution defendant after a *full and fair disclosure of all known [as distinguished from discoverable] material facts*. If this inquiry establishes that counsel's advice was relied upon by the plaintiff in bringing the component actions, it is a *complete defense* to malicious prosecution. *Page v. Rose*, Okl., 546 P.2d 617, 621 (1976); *Lewis, supra* note 29 at 433-34; *Williams, supra* note 16, 78 P.2d at 1056-57; *El Reno Gas & Electric Co. v. Spurgeon*,

[Footnote continued on next page]

if the earlier action had been determined adversely to the malicious-prosecution defendant, subsequent suits asserting the same cause of action presumably will have been instigated *without* probable cause. For *evidentiary* purposes the relevancy of the earlier adversely-determined cause is not denigrated by its status as a time-barred component in the action.[31] Nonetheless, there may be *no* recovery of *actual* damages suffered from suits *dehors* the applicable statutory limitation.[32]

D

Malicious Motivation

The essence of malicious prosecution is abuse of judicial process occasioned by *bringing* a civil proceeding *with* malice.[33] When a malicious-prosecution defendant (1) instigates successive suits upon a cause of action after an adverse determination, (2) files repetitive suits for the *same* cause of action before any are resolved or (3) initiates, dismisses and refiles the same cause of action, the bringing of the successive actions [even those concluded *dehors* the applicable statutory limitation] may be used as

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30 Okl. 88, 118 P. 397, 400 (1911). This result will not follow if the agency of the malicious-prosecution defendant's attorney was coupled with an interest. For a definition of a power coupled with an interest, see *Bowman v. Ledbetter*, 173 Ok. 345, 48 P.2d 334, 335 (1935). *See also* RESTATEMENT (SECOND) OF TORTS § 675, comment h (1977).

[31]*Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861, 866 (1947).

[32]*Id.*, 198 S.W.2d at 866.

[33]*Young, supra* note 16 at 710.

proof of an improper motive or of malice.[34] Nonetheless, where the earlier action *has not been adversely concluded*, successive proceedings upon the *same cause of action* are *not* relevant to *a lack of probable cause*.[35] The malicious-prosecution plaintiff carries the burden of proving the defendant's want of probable cause in bringing *each action comprising the multi-componential predicate*.

E

Termination in Favor of the Malicious-Prosecution Plaintiff

The fourth element of malicious prosecution requires that the claim terminate[36] in the plaintiff's favor in *each* of the component suits of the Process.[37] The Wolfbergs assert that component A was not resolved in Greenberg's favor. The material submitted, supplemented by the admissions in the parties' briefs in this court,[38] demonstrates that

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[34]*See* RESTATEMENT (SECOND) OF TORTS § 679, comment c (1977). *See also Myhre v. Hessey*, 242 Wis. 638, 9 N.W.2d 106, 111 (1943).

[35]*See* RESTATEMENT (SECOND) OF TORTS § 679, comment c (1977). *See also Page, supra* note 22 at 622.

[36]A proceeding is *not* terminated until all appeals concerning the cause are concluded. *See* RESTATEMENT (SECOND) OF TORTS § 659, comment f and § 674, comment j; *see also Harper v. Cox*, 113 Kan. 357, 214 P. 775 (1923).

[37]Resolution of the proceeding in favor of the person initiating it is conclusive proof that the action was brought *with* probable cause. *Glasgow, supra* note 16 at 838. *See also* RESTATEMENT (SECOND) OF TORTS § 675, comment b.

[38]Admissions made in the briefs may be considered as supplementing and curing an otherwise deficient appellate

[Footnote continued on next page]

Wolfberg asserted *separate* claims in component A—one for an accounting and dissolution of the partnership interests shared with Greenberg and a second claim for alleged breach of fiduciary duties owed by Greenberg to Green Wolf Oil Company. Where more than one claim is asserted in a proceeding, it is proper for the court to review each claim *separately* to determine if it satisfies the delict's critical elements. If a claim is terminated in favor of the malicious-prosecution plaintiff, an action for malicious prosecution will lie on that singular claim, regardless of who prevails on other claims pressed in the same suit.[39]

For there to be a prevailing party in an action requires that the underlying proceeding *not* have been dismissed *without* prejudice. *Dismissal without prejudice* is *not* a termination favorable to the malicious-prosecution plaintiff. To hold differently would be to countenance the possibility of countervailing results arising from the same action.[40]

[Footnote continued from previous page]

record. *Reeves, supra* note 22 at 753; *Womack v. City of Oklahoma City*, Okl., 726 P.2d 1178, 1181 (1986); *Timmons v. Royal Globe Ins. Co.*, Okl., 713 P.2d 589, 592 n.10 (1985).

[39]*Reeves v. Agee*, Okl., 769 P.2d 745, 752-54 (1989).

[40]The second and third components of the Process identified by the certifying court were dismissed *without prejudice. An action dismissed without prejudice may not serve as a componential predicate for a malicious-prosecution action.* Malicious prosecution requires that the predicate action be terminated in the malicious-prosecution plaintiff's favor. *Glasgow, supra* note 16 at 839. *See also Heck v. Humphrey*, ___ U.S. ___, ___, 114 S.Ct. 2364, 2371, 129 L.Ed.2d 383 (1994).

F

The Statute of Limitation Trigger

The limitation period for malicious prosecution[41] is triggered by *accrual of the cause of action.*[42] To determine when a cause accrues the court must ascertain (1) the nature of the right the litigant seeks to assert and (2) when the plaintiff could have *first* maintained the cause advanced to a

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[41]The pertinent terms of 12 O.S. 1991 § 95 are:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, *after the cause of action shall have accrued*, and not afterwards: * * *
>
> Fourth. Within one (1) year: An action for libel, slander, assault, battery, *malicious prosecution* or false imprisonment;...." [Emphasis added.]

[42]In *Retherford v. Halliburton Company*, Okl., 572 P.2d 966 (1978), we defined *cause of action* as follows:

> "A cause of action ... exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice.
>
> * * * * * *
>
> "[T]his jurisdiction is committed to the wrongful act or transactional definition of a 'cause of action.' Thus, no matter how many 'rights' of a potential plaintiff are violated in the course of a single wrong or occurrence, damages flowing therefrom must be sought in one suit or standbarred by the prior adjudication." *Id.* at 968-69.

successful result.[43] Generally, the one-year time bar is set in motion by each *qualified* componential predicate terminated in favor of the malicious-prosecution plaintiff.[44] This is the temporal point that triggers the limitation clock.

VI

ABUSE OF PROCESS[45]

A

Elements of the Tort

The quintessence of *abuse of process* is "not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate

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[43]*Samuel Roberts Nobel Foundation, Inc. v. Vick*, Okl., 840 P.2d 619, 624 (1992); *Neff, supra* note 3 at 87.

[44]*Noble Foundation, supra* note 43 at 624; *Reeves, supra* note 22 at 757; *Neff, supra* note 3, 41 P.2d at 87. An action's dismissal *without prejudice* is not recognized as a successful termination for the malicious-prosecution plaintiff. *See Glasgow, supra* note 16 at 839.

[45]*See* PROSSER AND KEETON, *supra* note 12, § 121 at 897 where abuse of process is distinguished from malicious prosecution in the following manner:

> "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."

See also Donohoe Const. v. Mount Vernon Associates, 235 Va. 531, 369 S.E.2d 857, 862 (1988), which accords with this view.

ends."[46] The tort's elements are (1) the improper use of the court's process[47] (2) *primarily* for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse.[48] Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse if the court's process is used legitimately to its *authorized* conclusion.[49] The party who asserts the abuse-of-process claim is *not required* to prove (1) the underlying action was brought *without probable cause* or (2) that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded.[50]

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[46]*Heck, supra* note 40 at ___ U.S. ___, 114 S.Ct. at 2372.

[47]The word "*process*", as used in the tort of "abuse of process", encompasses the entire range of procedures incident to the litigation process. *See Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 880 (1982).

[48]*Neil v. Pennsylvania Life Insurance Company*, Okl., 474 P.2d 961, 965 (1970); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 116 (10th Cir. 1983). *See also* RESTATEMENT (SECOND) OF TORTS § 682 which states the general principle of the delict as:

> "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

[49]*Donohoe, supra* note 45, 369 S.E.2d at 862; *see also* RESTATEMENT (SECOND) OF TORTS § 682, comment b.

[50]The abuse-of-process delict had its genesis in the case of Grainger v. Hill, 132 Eng.Rep. 769 (1828). *Grainger* is instructive in answering the third certified question. It holds that:

[Footnote continued on next page]

These principles impel the conclusion that it is not the "commencement or the termination" of a proceeding which triggers the limitations period for this tort. Rather, it is the *accrual* of the cause of action.[51] An abuse-of-process claim accrues when the process is abused and damages are incurred, *regardless of when the action is determined.* Because this delict concerns itself with specific misapplications or misuses of process, the statute of limitation must be applied *separately* to each component of the Process. The court may find earlier components of the Process [as defined by the certifying court] relevant as proof of an ulterior or improper motive in a subsequent action. Nonetheless, unless a court's *process* has been *misused or misapplied* in the *specific* proceeding relied upon to assert the abuse-of-process claim, the delict is not maintainable.

B

The Limitation Period for Abuse of Process

Because the tort of abuse of process is not included *eo nomine* among the delicts enumerated in 12 O.S. 1991

[Footnote continued from previous page]

> "[The Plaintiff's] complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is *immaterial whether the suit which that process commenced has been determined*, or not, or whether or not it was founded on reasonable and probable cause." *Id.* at 773. [Emphasis supplied.]

[51] *See supra* Subpart V(F) for a complete discussion of the statute-of-limitation trigger for actions governed by 12 O.S. 1991 § 95.

§ 95(4)[52]—those which are governed by a one-year time bar—*it falls within the unenumerated class* for which a two-year limitation period is provided by 12 O.S. 1991 § 95(3).[53] At the time § 95(4) was enacted the torts of malicious prosecution and abuse of process *both were known to the common law of Oklahoma as distinct delicts*; yet, abuse of process is not included among the actions governed by the one-year statutory time bar. Based upon the time-honored canon of construction known by the Latin phrase of *expressio unius est exclusio alterius*,[54] we conclude that the legislature *intended to exclude* abuse of

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[52]For the civil actions included in 12 O.S. 1991 § 95(4) see *supra* note 41.

[53]The pertinent terms of 12 O.S. 1991 § 95 are:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, *after the cause of action shall have accrued*, and not afterwards:
> * * *
> Third. Within two (2) years: An action for ... injury to the rights of another, not arising on contract, and not hereinafter enumerated;...." [Emphasis added.]

[54]This maxim of statutory interpretation means that *the expression of one thing is the exclusion of another. Newblock v. Bowles*, 170 Okl. 487, 40 P.2d 1097, 1100 (1935). *See also Williams v. Lee Way Motor Freight*, Okl., 688 P.2d 1294, 1301 n.17 (1984) (Opala, J., dissenting). The canon is applicable only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended for inclusion in the statute. *Hardesty v. Andro Corp.-Webster Division*, Okl., 555 P.2d 1030, 1036 (1976); *Spiers v. Magnolia Petroleum Co.*, 206 Okl. 510, 244 P.2d 852, 856-57 (1952).

process from the class of torts for which a one-year limitation was established.

VII

CONCLUSION

Application of the rules announced today requires that malicious prosecution be distinguished from abuse of process—the former lies for the malicious *initiation* of process and the latter for a *perversion* of the process *after* it is issued. If process is wrongfully initiated and later perverted, both torts would lie since they are not to be viewed as mutually exclusive delicts. The limitation periods for both torts are triggered by accrual of the respective causes of action. Because malicious prosecution is a tort disfavored by our jurisprudence and abuse of process is fact-specific, *i.e.*, tied to misuse of process in a particular action, the applicable limitation period must be gauged on a case-by-case basis. As pointed out earlier in this opinion, the question—whether the *earlier* components of the Process are relevant to show (a) in malicious-prosecution claims the elements of probable cause, malice and/or punitive damages or (b) in abuse-of-process claims improper or ulterior motives or application—constitutes a matter within the certifying court's cognizance.[55]

CERTIFIED QUESTIONS ANSWERED.

HODGES, C.J., LAVENDER, V.C.J., and HARGRAVE, OPALA, ALMA WILSON, SUMMERS and WATT, JJ., concur;

SIMMS and KAUGER, JJ., concur in result.

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[55]*See Shebester, supra* note 6 at 606.

APPENDIX E

EXCERPTS FROM TRIAL TESTIMONY OF ROBERT I. GREENBERG

* * * * *

Q Do you know what you have paid in attorney's fees in this case?

A Yes. In rough numbers, I do. I have the exact amounts, but not in my head.

Q What are those amounts?

A They vary from case-to-case because some of the cases did not go, proceed to trial, and some did not go all the way through appeals. The total amount that I am out-of-pocket is in the neighborhood of approximately $60,000.

Q And that is for you alone?

A Yes. Now, that does include what would be my share of trust monies expended on behalf of the Trust, money that would come to me had there been no lawsuits.

Q What would that amount be?

A Well, that included, as I say, that 60 included approximately $30,000 of trust bills. In other words, the Trust, I'm not including in the 60,000 other expenses of the Trust; I'm only including that part, that would have been roughly the one-half of the Trust, that would have been mine.

Q Mr. Greenberg, have you lost any income through failure to be able to devote the necessary time to your work while you were defending these lawsuits?

A Yes, I would say so.

Q Would you explain how.

A Well, I was basically under a, roughly, a five-year situation where any new venture I did involving the family became the subject of a lawsuit, so I eventually came to the position that I simply could not participate in any ventures that would come to my attention that otherwise might be worthy.

Q Can you give me a specific example?

A Yes, I can.

Q Would you do that, please.

A About a year and-a-half ago I was approached by a gentleman who knew I was in the golf course business, and with a proposal that if I would aid and assist him in putting a new golf course project together in Oklahoma City that I would be given a share of that golf course for my services, but without any charge to me monetarily.

Q Do you know what that golf course was -- what share of the golf course?

A Ten percent.

Q Do you know what that share would be worth?

A He succeeded in doing that project, it's just about complete now, and the involvement in that is approximately two-and-a-half million dollars, that is the rate --

Q That would be your share?

A My share would have been worth at least, to date, $250,000. I turned him down and I explained I just did not feel I could devote the time, I wasn't free to devote the time to it.

A Every maneuver, every proceeding, every stage of each lawsuit took tremendous time. For example, we haven't even talked on the note case, the fifth case; there was actually an arbitration stage, before it ever came to

trial, where the arbitrators, three arbitrators were selected, and we had to prepare for that.

Q Did you prevail at that hearing?

A Yes, we did prevail at that hearing. But it was just like a trial, it was like another trial, and we had to do it. And after we won at that, I was hoping there would be no need for a trial; and then there was a trial, and we had to prepare for that. Just as you prepare for something like this, it takes several days. All these were -- many were going on at the same time. There was never a time where there wasn't at least one or two cases going on, involving millions of dollars. And there was always the fear, and I mean fear, --

MR. FRANKS: Your Honor, I'm sorry, I'm going to object. The question, as I recall, was how much time, and I don't think we have a responsive answer on the way here.

THE COURT: Overruled.

A There was always the fear that I would not be able to prepare my case to state it in such a way that these allegations could be shown for what they were, false.

* * * * *

Q All right. Did you testify that you thought you made -- perhaps paid $30,000 and the Trust perhaps paid $30,000 for other things?

A Yes. What I tried to say, and I would not change what I said but I may not have explained it correctly; because my share was mostly from the Green Wolf case and I split some costs with the Trust, the -- what I'm trying to say is that if you would take the half of the Trust that was not reimbursed for the legal fees, in the case number five there was reimbursement of the Trust for legal fees but that's the only time it happened, if you would take all the other legal fees of the Trust, divide it by two and add that to the amount that I was out-of-pocket myself for defending

these lawsuits, you would come up to $60,000. That was particularly my share.

Q All right. I think I'm confused and need to follow up on that.

A I know, it would be easier to show you.

Q Let me just ask some specific questions, --

A Go ahead.

Q -- perhaps we can clarify this.

THE COURT: Let me ask one initially. When you speak about that division of fees affecting the Trust, are you referring to the fact that you are potentially a person to whom the corpus of the Trust would be distributed?

THE WITNESS: Yes, sir.

THE COURT: And so is that why you are counting that as an amount of expenditure that would ultimately be borne by you?

THE WITNESS: Yes, it would diminish the Trust corpus forever.

Q Let me ask you, and perhaps that might be a proper subject that the Judge will instruct on at some time, but let me ask you; without regard to that kind of consideration and just as to the raw numbers, what do you believe that you have spent out of your own pocket on these cases, and only if you know, do you know what you spent out of your own pocket?

A Well, there unfortunately have been more cases than just those five cases, but on those five cases --

Q Well, I'm asking about the five cases on your chart there, sir.

A On those five cases, --

Q And the proceedings in connection with them.

A -- on the part that I spent out-of-pocket myself and not being reimbursed for, is around $34,000.

Q And tell me where you did receive some reimbursement for fees in connection with any of those.

A It was in the fifth case.

* * * * *

Q You testified, sir, as I recall, to only a single what might have been characterized as a business opportunity which you felt you had foregone, and thought that your decision would be that that might have been related to these cases. And that was an opportunity to participate in a golf course development?

A Well, I think there were two I mentioned in my deposition, I want to be accurate.

Q Well, I'm talking about here at trial today.

A Trial? I believe I testified about one.

Q And how is it that you happened to know -- I believe you tried to attribute -- or you testified that you could attribute what you thought your interest in that might have been worth had you taken it, to what you thought its actual value is right now, and the fact you thought that you would have ten percent of it. And what I want to know is where you get your information, why do you know or think that this is a two-and-a-half million dollar asset, I think was the figure you used.

A Well, the developing partner has kept me informed, I have tried to help him any way I could. He's kept me informed and I've tried to advise him down the line, so that I am indeed familiar with the amount of money he raised to develop that golf course. That's really --

Q Is that a public golf course?

A -- what it takes to -- roughly a million dollars for the l d cost and about a million-and-a-half to actually do the things that you need to do to develop that land into a golf course.

Q I see. So what you're talking in terms of is the amount of money that had been invested into it or borrowed by it in order to put it together?

A Yes, that's the amount money he raised.

Q That's how much money he raised?

A That's what it took to do the project, which I would have had ten percent of, if I felt like I could do -- spend the time that I needed to spend on that.

* * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LAURENCE B. WOLFBERG, Plaintiff,	)	
v.	)	No. CIV-86-2441-P
ROBERT I. GREENBERG, Defendant.	)	

ORDER

This case was tried to the Court, sitting without a jury, on November 17 and 18, 1987. By Memorandum Opinion and Judgment entered December 17, 1987, the Court found in favor of defendant and against plailntiff on plaintiff's claim of breach of fiduciary duty. Parties were ordered to execute appropriate documents to affect the dissolution of the partnership. Subsequently, defendant filed a timely motion to tax attorney's fees as costs. Plaintiff has now responded in objection, and in consideration of the briefs of the parties, the Court denies defendant's motion for the assessment of attorney's fees.

Absent a statute or enforceable contract provision, a prevailing party is not entitled to recover attorney's fees. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975); Sisney v. Smalley, 690 P.2d 1048 (Okla. 1984). Defendant in this case cites Pope v. Vernon, 383 P.2d 9 (Okla. 1963) as authority for the recovery of attorney's fees. The authority of Pope is questionable, at best, in light of the Oklahoma Supreme Court's more recent rulings on the recoverability of attorney's fees. In Sisney, 690 P.2d at 1049, the Oklahoma Supreme Court described the only exception to the general rule to be "where equitable considerations demand when the services performed result in a succesful suit for the preservation, or increase of a common fund or a common property for the benefit of a

class of persons entitled to the fund or property," citing State ex rel. Burk v. Okl. City, 522 P.2d 612 (Okla. 1973). This exception would not apply here. However, assuming Pope permits the assessment of attorney's fees as an item of costs in a suit for an accounting of partnership assets, it does not require such an award. For the reasons stated below, the Court would decline to award attorney's fees.

Defendant asserts that where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, the Court may award attorney's fees. Assuming, without deciding, that this is a correct statement of the law of Oklahoma, the Court, in its discretion, declines to award attorney's fees to defendant on this basis. Plaintiff's lawsuit was not totally groundless. He succeeded in obtaining an accounting and final dissolution of the partnership. While the Court has held that plaintiff had not proved his cause of action on breach of fiduciary duty, this holding does not presume that the lawsuit was frivolous. On the contrary, plaintiff had a legally and factually arguable claim for relief, which was ultimately resolved against him. The Court cannot say, as a matter of law, that the lawsuit was filed in bad faith or for oppressive reasons.

Defendant, citing no statutory, contractual or other persuasive authority for the imposition of attorney's fees against plaintiff, must fail. His motion to tax defendant's attorney's fees as costs is therefore overruled.

IT IS SO ORDERED this _____ day of January, 1988.

/s/Robin J. Cauthron
Robin J. Cauthron
UNITED STATES MAGISTRATE

APPENDIX G

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.